



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO Earl M. Thompson FOR Breeze Hill Subdivision – Section 3 WP4-16-1932

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Earl M. Thompson, regarding the **Breeze Hill Subdivision – Section 3**, for the purpose of resolving certain violations of State Water Control Law, the applicable regulations, and permit WP4-16-1932.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. “Board” means the State Water Control Board, a permanent citizens’ board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. “Department” or “DEQ” means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. “Director” means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
4. “Discharge” means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.

5. "Dredging" means a form of excavation in which material is removed or relocated from beneath surface waters.
6. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
7. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
8. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
9. "Earl M. Thompson" or "Mr. Thompson" is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
11. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
12. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
13. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
14. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

15. "Property" or "Parcel" means the tract of land at 2043 Fairground Road, Goochland County VA, owned by **Mr. Thompson**.
16. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
17. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
18. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law, which addresses the Virginia Water Resources and Wetlands Protection Program.
19. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
20. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
21. "Va. Code" means the Code of Virginia (1950), as amended.
22. "VAC" means the Virginia Administrative Code.
23. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. On April 12, 2017, DEQ issued Permit No. WP4-16-1932 for the purpose of constructing the third section of an existing subdivision. The permanent impacts were limited to no more than 0.12 acre of forested wetland and 614 linear feet of stream bed. This project is cumulative with WP4-16-0748 (Breeze Hill Subdivision- Section 2), which authorized permanent impacts to 0.02 acre of forested wetlands and 257 linear feet of stream bed. Therefore, cumulative impacts for this project under the Virginia Water Protection Permit Regulation are 0.14 acre of forested wetland and 871 linear feet of stream bed.

2. On December 29, 2017, Department staff inspected the Property for compliance with the requirements of the State Water Control Law and the Regulations. The DEQ inspector made the following observations:
 - a. No riprap outfall protection was installed at the Impact Area 3-3 outfall;
 - b. Unauthorized hay bales were installed in the stream channel downstream of the Impact Area 3-3 crossing;
 - c. Silt fence was installed in the stream channel on the upstream side of the Impact Area 3-4-1 crossing;
 - d. Erosion and sedimentation controls and other best management practices were not installed in accordance with the Virginia Erosion and Sediment Control Handbook; such controls were not maintained and in good working order at Impact Area 3-3 and Impact Area 3-4-1 of the project area;
 - e. At the stream channel upstream of the crossing at Impact Area 3-4-2, approximately 35 linear feet of stream channel was filled with riprap;
 - f. The culverted crossing at Impact Area 3-3 was not countersunk and was not maintaining low flow conditions, disrupting the movement of aquatic life;
 - g. The stream was diverted to a storm water culvert to the north, resulting in secondary impacts to approximately 170 linear feet of stream channel downstream due to lack of hydrology;
 - h. The semi-annual construction status update for July 10, 2017 was not received;
 - a. A notification of construction commencement was not received by DEQ.
3. Va. Code § 62.1-44.15:20 and 9 VAC 25-210-50 states that, “[e]xcept in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters”.
4. VWP Permit Part I(B)(2) states that, “[n]o activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Pipes and culverts placed in streams must be installed to maintain low flow conditions and shall be countersunk at both inlet and outlet ends of the pipe or culvert, unless otherwise specifically approved by the DEQ.”
5. VWP Permit Part I(B)(5) states that, “Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook (Third Edition, 1992) or for mining activities covered by the general permit. The standards issued by the Virginia Department of Mines, Minerals and Energy are as effective as those in the Virginia Erosion and Sediment Control Handbook (Third Edition, 1992). These controls shall be placed prior to clearing and grading, and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.
6. VWP Permit Part II(E)(2) states that, “[t]he DEQ shall be notified in writing prior to the start of construction activities at the first permitted impact area.”

7. VWP Permit Part II(E)(3) states that, "A construction status update form provided by the DEQ shall be completed and submitted to DEQ twice per year for the duration of coverage under a VWP general permit. Forms completed in June shall be submitted by or on July 10, and forms completed in December shall be submitted by or on January 10."
8. On January 22, 2018, DEQ issued NOV No. 1801-000605 for the violations listed above.
9. On January 29, 2018, Baycare Restoration, LLC, on behalf of Mr. Thompson, submitted a Corrective Action Plan and a response to the NOV as follows:
 - a. The culvert was countersunk at the time of installation, but due to the lack of rip rap protection, resulted in the outfall being scored out;
 - b. The stream was diverted. After making three observations in different conditions, it appears the stream flow is directed within the culvert as designed at Impact 3-3 and does not cause a loss of hydrology of the stream channel; downstream causing any secondary impacts to 170 LF of stream;
 - c. The 35 LF of impact due to the installation riprap is accurate;
 - d. Confirmed failure to submit pre-construction notice and the semi-annual report:
10. On February 2, 2018 DEQ staff approved the Corrective Action Plan.
11. On March 7, 2018, Baycare Restoration submitted the July 2017 Semi-annual Construction Status Update and schedule of when impacts began in permitted impact areas.
12. On March 23, 2018 DEQ staff conducted an inspection and agreed that the Hydrology of the 170 linear feet of stream was unaffected by construction activity.
13. On April 6, 2018 DEQ agreed that the culvert identified in the NOV was installed at the correct elevation but not functioning correctly. Additional fill material needs to be installed in order to maintain low flow conditions.
14. Based on the results of the observation above the Board concludes that Mr. Thompson has violated Va. Code § 62.1-44.15:20, 9 VAC 25-210-50, and VWP Permit Part II(E)(2) & (3) as described in the paragraphs above.
15. In order for Mr. Thompson to complete his return to compliance, DEQ staff and Mr. Thompson have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Mr. Thompson, and Mr. Thompson agrees to:

1. Perform the actions described in Appendix A of this Order; and
2. Pay a civil charge of \$4,875 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Mr. Thompson shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Mr. Thomas shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Mr. Thompson for good cause shown by Mr. Thompson, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 1801-000605 dated January 22, 2018. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Mr. Thompson admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Mr. Thompson consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.

5. Mr. Thompson declares he has received fair and due process under the Administrative Process Act and the State Water Control Law and waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Mr. Thompson to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Mr. Thompson shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Mr. Thompson shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Mr. Thompson shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;
 - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
 - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.

10. This Order shall become effective upon execution by both the Director or his designee and Mr. Thompson. Nevertheless, Mr. Thompson agrees to be bound by any compliance date which precedes the effective date of this Order.

11. This Order shall continue in effect until:

- a. The Director or his designee terminates the Order after Mr. Thompson has completed all of the requirements of the Order;
- b. Mr. Thompson petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Mr. Thompson.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Mr. Thompson from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

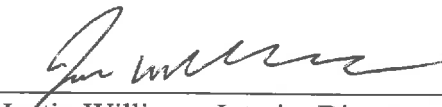
12. Any plans, reports, schedules or specifications attached hereto or submitted by Mr. Thompson and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.

13. Any documents to be submitted pursuant to this Order shall be submitted by Mr. Thomas or an authorized representative of Mr. Thomas.

14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, Mr. Thompson voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 23rd day of August, 2018


Justin Williams, Interim Director
Division of Enforcement
Department of Environmental Quality

Earl M. Thompson voluntarily agrees to the issuance of this Order.

Date: 6-28-18 By: Earl M. Thompson
Earl M. Thompson

Commonwealth of Virginia

City/County of Goshland

The foregoing document was signed and acknowledged before me this 28th day of
June, 2018, by Earl M. Thompson

Ellen L. Eddy
Notary Public

100865

Registration No.

My commission expires: 07-31-19

Notary seal



APPENDIX A
SCHEDULE OF COMPLIANCE

1. Within 30 Days of the effective date of the order, Mr. Thompson shall complete the Corrective Action Plan, approved on February 2, 2018. Any changes to the approved Final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Mr. Thompson shall complete the CAP in accordance with its terms.
2. Unless otherwise specified in this Order, Mr. Thompson shall submit all requirements of Appendix A of this Order to:

Piedmont Regional Office
VWP Program
4949-A Cox Road
Glen Allen, VA 23060